OH KANG KUANG & ANOR v. ROEBUCK DEVELOPMENT SDN BHD; ALLIED ALPINE (M) SDN BHD (PETITIONER)

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
AZAHAR MOHAMED JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: J-02(IM)-2510-11-2013]
26 JANUARY 2015

CIVIL PROCEDURE: *Action – Leave application – Whether affidavit-based – Procedure – Whether based upon assertions of cause of action and facts relied by parties – Whether court could make findings on disputed facts*

The appellants appealed against the dismissal by the High Court of their application under s. 226(3) of the Companies Act 1965 for leave of the winding-up court to commence legal proceedings against the respondent. The respondent was a licensed housing developer in which the appellant had purchased three condominium units. The appellants claimed that the properties sold by the liquidator, upon winding-up of the respondent company, were their properties and hence had been sold wrongfully. The High Court dismissed the application on the basis of findings on various facts that were disputed on the affidavits filed in the application.

Held (allowing appeal with no order as to costs)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The leave application is affidavit-based. The affidavit-based procedure is based upon assertions of cause of action and facts relied upon made by the respective parties in respect of their application and defence. Hence, leave application is not the occasion whether the proposed civil suit will succeed, but whether there are relevant triable issues. (para 10)

(2) The affidavits before the High Court amply demonstrate that there were disputed facts being relied upon in the proposed civil suit. The High Court erred in proceeding to make findings on the disputed facts, resulting in the appellants' application being dismissed. Had the High Court correctly appreciated that the disputed facts were in relation to the appellants' basis in their proposed civil suit, and not the application itself, the High Court could not have come to the decision to dismiss the leave application. (para 11)

(3) The High Court also erred in law in holding that because all information of the borrowers kept by the bank or financial institutions was confidential and protected, any release of information pertaining to the borrowers would be in contravention of Banking and Financial Institutions Act 1989 and thus prohibited. The High Court failed to consider the fact that since the account was that of the respondent company, the liquidator of the respondent company was not subjected to the restriction. (para 12)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu-perayu merayu terhadap penolakan, oleh Mahkamah Tinggi, permohonan mereka di bawah s. 226(3) Akta Syarikat 1965 bagi kebenaran mahkamah penggulungan untuk memulakan prosiding undang-undang terhadap responden. Responden merupakan pemaju perumahan berlesen di
B mana perayu-perayu telah membeli tiga unit kondominium. Perayu-perayu menyatakan bahawa harta-harta yang dijual oleh pelikuidasi, selepas penggulungan syarikat responden, adalah harta-harta mereka dan oleh itu telah dijual secara salah. Mahkamah Tinggi menolak permohonan tersebut berdasarkan dapatan-dapatan atas pelbagai fakta yang dipertikaikan dalam
C afidavit-afidavit yang difailkan dalam permohonan tersebut.

Diputuskan (membenarkan rayuan tanpa perintah untuk kos)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

D **(1)** Permohonan untuk kebenaran adalah berasaskan afidavit. Prosedur yang berasaskan afidavit adalah berdasarkan pernyataan kausa tindakan dan fakta-fakta yang disandarkan yang dibuat oleh pihak-pihak yang berkenaan berkaitan dengan permohonan dan pembelaan mereka. Oleh itu, permohonan kebenaran bukan perkara sama ada guaman sivil yang
E dicadangkan akan berjaya, tetapi sama ada terdapat isu-isu relevan yang boleh dibicarakan.

(2) Afidavit-afidavit di Mahkamah Tinggi menunjukkan dengan cukupnya bahawa terdapat fakta-fakta yang dipertikaikan yang disandarkan dalam guaman sivil yang dicadangkan. Mahkamah Tinggi khilaf dalam
F meneruskan untuk membuat dapatan-dapatan atas fakta-fakta yang dipertikaikan, yang membawa kepada penolakan permohonan perayu-perayu. Jika Mahkamah Tinggi mempertimbangkan dengan betul bahawa fakta-fakta yang dipertikaikan adalah berkaitan dengan asas perayu-perayu dalam guaman sivil yang dicadangkan mereka, dan bukan
G permohonan itu sendiri, Mahkamah Tinggi tidak akan mencapai keputusan untuk menolak permohonan kebenaran.

(3) Mahkamah Tinggi juga khilaf dari segi undang-undang dalam memutuskan bahawa oleh sebab kesemua maklumat peminjam-peminjam disimpan oleh bank atau institusi kewangan adalah sulit dan
H dilindungi, apa-apa pelepasan maklumat berkaitan dengan peminjam-peminjam adalah bertentangan dengan Akta Bank dan Institusi-Institusi Kewangan 1989 dan oleh itu dilarang. Mahkamah Tinggi gagal mempertimbangkan fakta bahawa oleh sebab akaun tersebut adalah kepunyaan syarikat responden, pelikuidasi syarikat responden tidak
I tertakluk kepada sekatan tersebut.

Case(s) referred to:
Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 226(3)

For the appellants - Wong Kai Fen; M/s Tan Hee Soon, Wong & Partners
For the respondent - Pamela Edward Ephraim; M/s Ephraim & Assocs

[Appeal from High Court, Johor Bahru; Winding-up Company No: MT1-28-14-2004]

Reported by S Barathi

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellants Oh Kang Kuang and Lim Sin Ngoh appealed against the dismissal by the High Court of their application under s. 226(3) of the Companies Act 1965 for leave of the winding-up court to commence legal proceeding against the respondent company Roebuck Development Sdn Bhd.

[2] The appellants claimed that the properties sold by the liquidator of the respondent company were their property and hence has been sold by the liquidator wrongfully. The respondent was a licensed housing developer of a housing project known as the La Cemara Desaru Resort Condominium in the district of Kota Tinggi, Johor. The first appellant purchased two units, and another unit was purchased by the first and the second appellants. The appellants claimed they had paid the full purchase price.

[3] The respondent company was wound-up on 29 July 2004. As of that date, six of the ten blocks of the La Cemara Beach Resort had been completed with certificates of fitness for occupation. Originally the Official Receiver was appointed as the liquidator. Subsequently, one Mr Wong Weng Foo was appointed as liquidator on 9 December 2004. He was replaced by one Mr Jambulingam Sethuraman Raki on 15 August 2007 as liquidator by the creditors of the respondent company.

[4] According to Mr Jambulingam ("the liquidator"), none of the essential documents and records pertaining to the sale and purchase agreements ("SPA") with the purchasers, the building plans of the above project and the accounts of payments received from the purchasers etc, were in the respondent's possession. The information received from the *pro tem* or owner's committee was insufficient to recompile the register of owners. The appellants' three units were amongst 21 units with incomplete proof of ownership.

[5] In its grounds of decision, the High Court stated the specific facts leading to the appellants' application, the subject of the appeal before this court:

A [8] With a view to obtaining a Vesting Order in respect of the aforesaid 21 units, the Liquidator placed an advertisement in a local newspaper on 8.11.2010 and The Straits Times Singapore on 11.11.2010 requesting for all purchasers of the 21 units to submit their proof of ownership by 3.10.2010. The units were clearly and specifically identified in the advertisements. More importantly final notice was given of the proposed
B Vesting Order and its implications. The essential documents required for proof of ownership were also specifically spelt out.

[9] On 15.03.2011, the Liquidator obtained a Vesting Order from this Court pursuant to section 233 of the Companies' Act. The Order, *inter alia*, gave the Liquidator absolute power to deal with the said 21 units in
C accordance with section 236(2) and upon vesting of the units in the Liquidator no purchasers, financial institutions and/or third parties were allowed to make any legal and/or beneficial claims on all 21 units from the date of the order.

[6] The reasoning of the High Court is contained in the following
D paragraphs:

[15] Among the allegations pertaining to the Vesting Order ('VO') having been unlawfully obtained was that the Respondent had complete records of all purchasers of the said project when it was wound-up after which the records were taken into the liquidator's custody and kept in his
E possession. However, the Applicants themselves admitted that they had no knowledge of the Respondent having being wound-up and the appointment of 2 liquidators that followed "until the appointment of the present liquidator which was some 3 years after the winding-up order. Hence, by their own admission, it was impossible for the Applicants to have had knowledge of what records were in the Respondent's
F possession at the material time that were taken into custody by the liquidator. The Applicants had failed to prove that the records were actually with the liquidator. It is trite law that he who asserts the existence of a particular fact bears the onus of proving its existence (section 103, Evidence Act, 1950). The Respondent was wound-up in 2004 and the liquidator was only appointed in 2007. From the undisputed evidence
G there were no available records of SPAs with the purchasers of the project and it was for this reason that the liquidator had to undertake exercise spanning several years to recompile the register of owners. The liquidator had in this regard acted *bona fide* in the discharge of his duties and had taken all reasonable and diligent steps to ascertain ownership of the properties before going to Court to obtain the VO.

H [16] The Applicants also contended that the liquidator could have procured all necessary information and details of the purchasers and/or ownership of the owners from the financial institutions involved in the project. The short answer to this, as contended by the liquidator, is that all information of the borrowers kept by the bank, or financial institutions
I is confidential and protected. Any release of information pertaining to the borrowers would be in contravention of the Banking and Financial Institutions Act, 1980 and thus prohibited.

> [17] In the light of the chronology of events before the VO was obtained, there was, in my view, sufficient evidence of an intensive verification of ownership process conducted by the liquidator. Due notice had been given to all purchasers *via* advertisements and letters to submit complete documentation of ownership within the stipulated period failing which their claims to the properties would be excluded. The verification exercise, which commenced in October 2006 and ended in late 2011 was shown to have been carried out purely to facilitate the liquidator in establishing the rightful purchasers/owners of the units.
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> [18] The Applicants alleged that they had not received letters from the Respondent requesting for "complete proof of ownership. However, the record showed that the liquidator had written to them on 11.06.2007 and 17.12.2012 for this purpose together with letters from the liquidator's solicitors on 24.11.2006 and 23.03.2007 respectively addressed to them with the same request. Their claim of having submitted all relevant documents to the liquidator was not supported by any evidence. The letter from the liquidator's solicitors dated 23.03.2007 sent out by certificate of posting had indicated that the solicitors were unable to verify ownership of the Applicants' units and requested for the SPA, Lease Agreement and payment receipts. The Applicants also alleged that they were working overseas during the placement of the advertisements by the liquidator from October 2006 - November 2010 but failed to furnish any proof in support. The Applicants had apparently attended a meeting with the liquidator on 08.07.2007 and alleged that they had forwarded the required documents to the liquidator. However, no evidence was produced that the documents had actually been submitted to the liquidator and of acknowledgement by him. This too was again a bare assertion without being substantiated. On the other hand, their attendance at the meeting was proof that they were aware of the verification exercise carried out by the liquidator.

[7] These paragraphs in the grounds of decision of the High Court demonstrate that the application was dismissed on the basis of findings by the High Court on various facts that are disputed on the affidavits filed in the application.

[8] The leave application, of course, is affidavit based. On the basis of the affidavits, it is clear there were disputes as to facts pertaining to the obtainment of the vesting order, and evidence as to the accounts.

[9] The High Court erred in failing to confine its consideration to the undisputed facts and proceeding to determine and make findings of fact on the disputed facts themselves. In *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997 FC, Edgar Joseph Jr in the Federal Court, set out the case law as follows:

> The Law on the approach of the Court of first instance in evaluating and resolving a conflict of evidence on affidavit was well captured by the Privy Council in *Eng Mee Yong v. Letchumanan* [1987] 3 WLR 413 and in *Tay Bok Choon v. Tahansan Bhd* [1987] 1 WLR 413.

In the first of these cases - *Eng Mee Yong* - Lord Diplock delivering the advice of Their Lordships of the Board said this (at p. 381 D):

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflict of evidence on affidavit, this does not mean that he is bound *to accept uncritically*, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however *equivocal, lacking in precision, inconsistent with undisputed contemporary document or other statements by the same deponent, or inherently improbable itself may be.* (emphasis added)

In the second of these cases - *Tahanson* - Lord Templeman put the point more shortly and generally, thus:

> If allegations are made in affidavits by the petitioner and those allegations are *credibly denied* by the respondent's affidavits, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegation. (emphasis added)

The second point to note regarding this part of the case is that, it is an elementary proposition sometimes overlooked with resulting confusion and possible injustice that where statements are made by a deponent, based on information and belief these ought not to be looked at at all, unless the court can ascertain not only the source of the information and belief but also unless the deponent's statement is corroborated by someone who speaks from his own knowledge. (See, *In re JL Young Manufacturing Ltd Co* [1900] 2 Ch 753, 754 per Lord Alverstone CJ, applied by the old Federal Court in *Cantrans Services (1965) Ltd v. Clifford* [1974] 1 LNS 14).

[10] The affidavit based procedure is based upon assertions of cause of action and facts relied made by the respective parties in respect of their application and defence. It does not have the process available in a civil suit procedure where the disputed facts relied upon having been identified, the parties proceed by discovery and interrogatories to check and verify the evidences pertaining to the disputed facts before making findings on those facts, and only then, taking into consideration those findings together with undisputed facts, would the court make its decision on the suit. Hence, it can be said that the leave application is not the occasion whether the proposed civil suit will succeed, but whether there are relevant triable issues.

[11] The affidavits in the application before the High Court amply demonstrate there were disputed facts being relied upon in the proposed civil suit. The High Court erred in proceeding to make findings on those disputed facts, resulting in the appellants' application being dismissed. Had the High Court correctly appreciated that those disputed facts were in relation to the appellants' basis in their proposed civil suit, and not the application itself, the High Court could not have come to the decision to dismiss the leave application.

[12] Further, the High Court erred in law in holding that because all information of the borrowers kept by the bank, or financial institutions is confidential and protected, any release of information pertaining to the borrower's would be in contravention of the Banking and Financial Institutions Act 1989 and thus prohibited. The High Court failed to consider the fact that since the account was that of the respondent company, the liquidator of the respondent company is not subjected to the restriction.

[13] For the foregoing reasons, this court allowed the appeal with no order to costs, entered judgment in terms of prayers 1 and 2, directed that the appellants file their civil suit within two weeks of today and ordered that the deposit be refunded.